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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: COBRO Corporation

File: B-287578.2

Date: October 15, 2001

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DIGEST

Protest of cost comparison pursuant to Office of Management and Budget Circular No. A-76 is sustained where the solicitation inviting private-sector proposals erroneously required offerors to provide facilities for new inventory rather than making available existing government facilities, without the agency's having a reasonable basis for the restrictive requirement--specifically, without having conducted the study needed to justify the restriction.

DECISION

COBRO Corporation protests the Army Materiel Command's decision, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that it would be more economical to perform T-53 series aircraft engine materiel management functions in-house rather than to contract for these services with COBRO under request for proposals (RFP) No. DAAH23-99-R-108. COBRO challenges the adequacy of the agency's comparison of the performance provided under the government's most efficient organization (MEO), as reflected in the government's technical performance plan (TPP), with the performance offered under COBRO'S proposal. COBRO primarily protests the solicitation's storage facilities specification for new inventory, and the concomitant understated inventory storage costs under the adjusted MEO, and also alleges that the agency improperly failed to adjust the MEO costs to account for the technical superiority offered under COBRO's proposal.

We sustain the protest.

BACKGROUND

On August 17, 1999, the Army Aviation and Missile Command, Redstone Arsenal, issued the instant RFP as a total small business set-aside, to conduct a competition between private-sector offerors as part of a government cost comparison to determine whether accomplishing the specified work under contract or by government performance was more economical. The RFP sought proposals to provide all personnel, equipment, tools, material, supervision and other items and services necessary to provide logistic support requirements and priorities for the T-53 engine program, in accordance with the solicitation's performance work statement (PWS). RFP § A, at 5. The PWS included a requirement to provide new inventory storage, for which offerors were required to supply their own facilities because the RFP provided that existing government facilities were not available for this purpose.

The initial RFP stated that the successful offeror would be selected on the basis of the proposal offering the best value to the government based on technical, price and past performance factors, with the technical factor more important than the other two factors combined. RFP §§ M-2(A), M-4. The RFP was amended to provide that proposals would be evaluated on these same three factors, but with technical acceptability to be assessed on a "go/no go" basis, and price and past performance approximately equal in importance. RFP amend. 7, § M-3(A). As amended, the RFP stated that the successful offeror was to be selected on the basis of the "proposal . . . determined to offer the best overall value to the government based upon the evaluation criteria." Id. §-M-5. After reading this amendment, one prospective offeror raised the following point: "Our interpretation . . . is that, assuming the Government-continuation option is more expensive than one or more offerors, and one or more offerors meet the Technical 'GO' status, the determination will go automatically to the lowest price. There really is no other 'Best Value' consideration to provide a distinction between the lowest bidder and all others." RFP amend. 8, at 4. The agency reply, provided by amendment to the RFP, stated: "Award will be made to the offeror whose proposal is determined to offer the best overall value to the Government based on the evaluation criteria of Technical Acceptability, Price and Past Performance, which is found in Section M. Therefore, award may be made to other than the low offeror." Id.

Proposals were submitted by two offerors, Radian and COBRO by the December 10, 1999, closing date. The agency conducted protracted discussions with the offerors until February 2, 2001, after which revised final proposals were requested and were received on February 7. COBRO's proposed price was $11,389,427 and Radian's price was $26,406,361. The agency's source selection evaluation team (SSET) evaluated the proposals and, based on the SSET's recommendations, the contracting officer selected COBRO's proposal for comparison with the MEO. The only basis for this selection contained in the record appears in the agency material prepared for COBRO's debriefing, and consists of a statement that "[l]ow price was the deciding factor as both offerors were rated a 'Low Risk' for Past Performance and a 'Go'

under technical."[1] Agency Report (AR), Tab E, Debriefing, at 21. On March 12, COBRO was notified that its proposal had been selected for comparison with the MEO.

On March 23, the agency conducted a cost comparison between the COBRO proposal and in-house performance under the MEO. The contracting officer did not make any adjustments to the MEO because he believed that the "go/no go" technical criterion under the RFP called for private-sector offerors to satisfy the PWS requirements with a proposal that "only had to be minimally acceptable." AR at 1. COBRO's price, after adjustments were made for certain items contemplated under OMB Circular A-76, was calculated as $12,339,600, and the cost of performance under the MEO was calculated as $6,163,311. Because the cost under the MEO was lower than COBRO's adjusted proposed price, the agency tentatively determined to perform the requirement in-house. COBRO was notified of the cost comparison results on March 26, and timely filed an administrative appeal with the Army on April 7, raising 11 issues.

The agency administrative appeals board (AAB) sustained several of COBRO's objections in whole or in part. However, the AAB ratified the determination to perform in-house even after concluding in its final decision that a substantial increase in the cost of the MEO was required. Under the recalculated cost comparison, based on the AAB's findings, the MEO costs were increased to $8,996,289, and COBRO's adjusted price was $12,350,790. Accordingly, the agency determination to perform the requirements in-house was confirmed on the basis that the MEO cost remained $3,354,501 lower than COBRO's adjusted price. COBRO was notified on June 26 of the final agency decision and thereafter timely filed this protest with our Office.

DISCUSSION

COBRO's protest to our Office raises two primary allegations: that the RFP improperly required private-sector offerors to propose their own facilities to physically store, inventory and maintain newly acquired equipment, rather than to utilize existing and available government facilities as was done under the adjusted MEO calculations, and that the agency did not properly account for the comparable costs under the MEO in making the cost comparison; and that by the terms of the RFP and by its conduct of discussions, the agency solicited offerors to propose technical performance enhancements, but did not consider any evaluated enhancements in COBRO's proposal in comparing the performance level provided under the MEO, which allegedly did not even satisfy the minimum PWS requirements.

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[1] The agency has confirmed that no written selection document was prepared.

To preserve the integrity of the A-76 cost comparison, private-sector offerors and the government must compete on the same scope of work. See Revised Supplemental Handbook (RSH), part I, ch. 3 ¶H.3.e; see also Aberdeen Tech Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 8. The MEO and the private sector proposals must, first, comply with the minimum PWS requirements, RSH, part II, ch. 2, A.1.b, then, where a "best-value" approach is taken in evaluating private-sector proposals, the agency must perform a direct comparison between the non-price aspects of the MEO and the "best-value" private sector proposal. That is, the agency must compare the MEO to the private-sector proposal to determine whether the successful private-sector proposal offers quality and performance exceeding the PWS requirements, such that the in-house offer must be brought up to the private-sector proposal's level of performance and quality. RSH, part I, ch. 3, ¶ H.3.d ; Rice Servs. Ltd., B-284997, June 29, 2000, 2000 CPD ¶ 113 at 7.

New Inventory Facilities

It is undisputed that the solicitation required offerors to provide facilities to store, inventory and maintain newly acquired equipment, and indicates that no government facilities are available for these purposes. COBRO states, and the agency does not dispute, that COBRO's costs associated with satisfying this new inventory requirement amounted to [DELETED], out of its total proposed price of $11,389,427. Protest at 8. The MEO contemplates the use of existing government facilities to provide new inventory storage, but the initial MEO cost estimate did not include any costs for new inventory storage and maintenance, apparently based on the agency's view that those costs could not be identified. The AAB determined that "[t]he MEO inappropriately omitted the costs to physically store, inventory, and maintain newly acquired equipment. Since such costs were required for inclusion by the contractor and would be required for MEO performance, the government must include these costs in their in-house cost estimate." AR, Tab C1, AAB Decision, at 2.

The AAB directed the activity to develop cost estimates for the physical storage, inventory and maintenance of T-53 equipment. Because the activity used and would continue to use the Defense Logistics Agency (DLA) for services associated with T-53 inventory control, a cost estimate was developed using the "total occupied cost" for fiscal year 2000 that DLA charged the Aviation and Missile Command, and extrapolating T-53 costs on the basis of the cubic footage requirement associated with T-53 inventory in relation to the total aviation and missile inventory. This cost was calculated as $2,721,987.65, which the AAB directed the activity to add to the cost of MEO performance for cost comparison purposes. Id.

In its administrative appeal, COBRO also argued that the government should have made the existing government inventory storage facilities available to offerors under the RFP because these facilities were included under the MEO on a no-cost basis. The AAB recognized that the RFP inappropriately required that offerors propose their own facilities because the existing government facilities had to be made

available unless an appropriate study determining otherwise had been conducted, and the activity had not conducted any such study. Id. at 5. Nonetheless, the AAB denied COBRO's appeal in this regard and declined to direct any correction on the basis that this aspect of the appeal was untimely because the facilities requirement had been spelled out in the RFP and COBRO had failed to protest the requirement before submitting its proposal. Id. at 5-6. The AAB also noted that "the board is not empowered to direct adjustments that result in a change to the government's requirements." Id. at 6.

As the AAB stated in its analysis:

> Paragraph 4-7a of [Army Regulation] 5-20 states "Facilities and equipment. According to general policy set forth in the FAR, the government will offer or not offer existing facilities and equipment to a contractor depending on which is in the government's best interest. Offering the facilities and equipment on hand, and programmed for use by the MEO, to prospective contractor[s] is normally in the government's best interest as the most economical and competition-enhancing alternative. The decision not to offer existing facilities and equipment to prospective contractors will be based on a comprehensive, documented analysis of the costs and benefits of offering versus reprogramming the facilities and equipment. (DA [Department of the Army] Pam 5-20, paragraph 3-10)."

Id.

The agency now concedes the impropriety of the RFP's failure to offer the existing government facilities to the private-sector offerors without the agency having undertaken the required documented analysis, stating that it "now realizes that its interpretation of the . . . regulatory guidance was [most] likely inaccurate and a comprehensive cost benefit analysis should have been conducted and documented." AR at 5-6. However, the agency contends that the protester's allegation in this regard was properly dismissed as untimely by the AAB and is similarly untimely in this protest to our Office. AR at 6. We disagree.

Our regulations require that any solicitation impropriety that is apparent prior to the time set for receipt of proposals must be protested prior to the closing time set for proposal submission. 4 C.F.R. § 21.2(a)(1) (2001). However, here the solicitation impropriety at issue was not apparent prior to the closing date. As the AAB decision recognizes, under the applicable guidance, the agency properly could have determined not to offer the existing government facilities to the private-sector offerors as long as the agency conducted the requisite comprehensive analysis. While, as the parties agree, the solicitation clearly provided that these facilities would not be made available, nothing in the solicitation, or elsewhere in the record, provided prospective offerors with any reason to believe that the agency had

improperly failed to complete the requisite study to justify this restriction. Thus, COBRO first learned of the basis to object to the facilities restriction when it was disclosed by the agency, after the competition had been completed, in the AAB decision, that the agency had failed to undertake the required study. In light of our long-standing view that doubts over timeliness issues should be resolved in favor of protesters, the circumstances presented here warrant us to conclude that this challenge to the terms of the solicitation is timely raised by COBRO in its protest to our Office. See N&N Travel & Tours, Inc., et al., B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶ 146 at 7.

The Competition in Contracting Act generally requires that solicitations permit full and open competition and contain restrictive provisions or conditions only to the extent necessary to satisfy the needs of the government. 10 U.S.C. §§ 2305(a)(1)(A), (B) (1994); Virginia Elec. and Power Co.; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 11. Here, the Army, without adequate justification, improperly imposed the solicitation restriction that the existing government facilities (whose use was assumed in the MEO) would not be made available to the private sector offerors. In our view, the specifications were materially defective because the agency had no reasonable basis to conclude that the facilities restriction placed in the RFP (which, as noted above, the agency concedes simply resulted from its misunderstanding of the Army regulation) represented the agency's actual needs.

Significantly, this specification defect substantially compromised the private-sector competition and the resulting public/private cost comparison as well. COBRO's technical approach emphasizes technical procedures and enhancements relating to efficient new inventory storage and handling, which are directly related to the storage facilities. As noted above, COBRO states, without dispute, that nearly half of its total proposal costs relate to inventory storage, for which government facilities should have been made available. Accepting, arguendo, the accuracy of the agency's $2,721,987.65 adjustment for the costs of inventory storage which was omitted from the MEO (an amount which COBRO argues is incomplete and understated), this constitutes almost one-third of the final adjusted MEO costs. In view of this substantial impact of inventory storage facilities on total cost, as well as on the technical approach adopted by COBRO (and presumably by the other private-sector offeror), we conclude that the agency's inclusion of an unjustified restriction in the RFP prejudiced COBRO. Moreover, the selected COBRO proposal cannot reasonably be considered to fairly represent either the technical approach or the price that would have resulted had the competition been conducted on the basis of the government's actual needs, that is, if the existing government facilities had been made available.

In addition, there is no way to ascertain what effect this restriction may have had on the field of competition: other small business competitors may have been willing and able to participate if the government facilities had been made available; those

offerors who did compete may have submitted substantially different proposals, or even elected not to compete. In these circumstances, there is no adjustment to the MEO that could compensate for the effect of the deficiency in a manner that would result in a valid cost comparison, since it is not possible to determine what the selected private-sector proposal would have been under specifications which properly reflected the agency's actual needs. Because the agency failed to properly solicit a private-sector proposal that could provide a reasonable basis for comparison with the MEO, the protest is sustained.

Enhancements

While we sustain the protest on the basis of the above-explained solicitation impropriety, we briefly address the evaluation criteria issue because we believe that the agency should make the criteria clearer under a revised solicitation. COBRO asserts that its technical proposal substantially exceeded the PWS requirements and that the agency failed to make the requisite adjustments to the MEO to bring it up to a comparable level as is required under an A-76 cost comparison. See Rice, supra, at 7. The agency agrees that no such adjustments were made to the MEO, but takes the position that none were required to an MEO that satisfied minimum PWS requirements because the private-sector competition was conducted under a solicitation with a go/no go technical factor and, therefore, did not call for any cost/technical tradeoff, and simply required proposals to similarly satisfy the minimum PWS standards.

As described above, the evaluation criteria under the original solicitation called for a best-value selection which clearly required a cost/technical tradeoff. Amendment 7 changed the technical criteria to go/no go, while still calling for a tradeoff and a best-value award. In the protester's view, the amended solicitation, and the agency's answer to the evaluation criteria question contained in amendment 8, suggested that the agency would evaluate the degree of technical acceptability among the competing proposals. Moreover, the protester points to discussion questions in which the agency, rather than advising COBRO that the enhancements the firm proposed were uncalled for, asked for substantiation of the technical enhancements that COBRO proposed, thus suggesting that the agency viewed those enhancements as of value.[2] Essentially, COBRO's position is that the agency's actions led the firm

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[2] Thus, for example, among the questions that the agency asked COBRO were: "What technology enhancements and service improvements will [COBRO] bring to the Government? Show examples." (AR, Tab E4, attach. 1, Discussion Questions, at 3); "What quick reaction commercial practices will COBRO use to procure parts?" (Id. at 4); "What is COBRO's understanding of meeting or exceeding Government outputs?" (Id. at 5); and "How will the materiel handling and storage capabilities of CatLogistics provide a 'No-Risk' solution to the management of the T-53 engines? (Id.)

to submit a proposal that exceeded the minimum technical requirements of the solicitation, and that the record establishes that COBRO's proposal was, in fact, evaluated as providing technical enhancements beyond the PWS requirements.[3]

Because we are sustaining the protest on other grounds and recommending that the agency issue a revised solicitation, we need not resolve the dispute between the parties on this issue. In implementing our recommendation, however, the Army should take care to avoid any confusion, either in the revised solicitation or in the conduct of discussions, about whether the agency is interested in proposals exceeding the minimum technical requirements. That clarity is important because, once an agency makes clear that it is not requesting more than the solicitation's required minimum level in a specific regard (or, as was apparently intended here, in the entire technical area), the agency need not (and, indeed, should not) consider any enhancements in choosing among competing private-sector proposals, nor should it take steps to bring the MEO up to the level of performance or quality implicit in enhancements included in the private-sector proposal that is selected.

RECOMMENDATION

Because the record provides no basis for the agency decision not to make existing government facilities available to offerors, we recommend that the agency prepare a new RFP for private-sector competition making these government facilities available. In the event that the specification does not merely reflect a misunderstanding and the agency actually believes that the existing government facilities should not be offered, it should conduct the study required to make a reasoned determination of whether it properly can issue the solicitation without making the facilities available. In either instance, a new MEO and in-house cost estimate should be prepared, taking into account the inventory storage costs; the private-sector competition should be conducted under an RFP which makes clear whether the selection will be based on a cost/technical tradeoff or on the basis of the lowest technically acceptable proposal; and an appropriate comparison should be made with the revised MEO and in-house cost estimate.

Our Office will recommend that the protester be reimbursed its proposal preparation costs under 4 C.F.R. § 21.8(d)(2), where we sustain a protest of a procurement in which the protester had a substantial chance for receiving an award and is prevented from having the opportunity to compete. The Hamilton Tool Co., B-218260.4, Aug. 8,

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[3] Supporting the protester's position is, for example, language in the evaluation summary listing as a "strength" that "COBRO provided a thorough explanation of how they would meet and exceed the required Service Standards . . . . [indicating] their complete understanding of the importance of these standards, for both the customers in the field and to COBRO." AR, Tab E2, Overall Summary Evaluation, at 1-2.

1985, 85-2 CPD ¶ 132 at 2. Normally we do not recommend preparation costs where a protester is given an opportunity to compete under a corrected solicitation. Id. Here, however, nearly 2 years have elapsed since the initial 1999 closing date. The protester expended substantial cost and effort on a proposal which may have virtually no value under a recompetition, particularly since the reissued solicitation is likely to represent a requirement that is fundamentally different from that which was presented under the defective solicitation. Under these circumstances, we recommend that COBRO be reimbursed for its proposal preparation costs. See Aerospace Design & Fabrication, Inc., B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139 at 20. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel